STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals:
Michael Talbot, P.J., Helene White and Kurtis T. Wilder, JJ.

KENNETH KARACZEWSKI,
Plaintiff-Appellee,

No. 129825

vs.

FARBMAN STEIN & COMPANY and
NATIONWIDE MUTUAL INSURANCE COMPANY
Defendant-Appellants.

WCAC: 02-000480
COA No. 256172

BRIEF OF THE WAYNE COUNTY PROSECUTOR'S OFFICE AS AMICUS CURIAE*

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Statement of the Question

I.

Our judicial oath requires justices swear or affirm they will support the constitution of this state. Legislative power is vested in the state House and Senate; further, no person exercising powers of one branch of state government may exercise power belonging to another branch. Faced with a judicial construction of a statute demonstrably contrary to its text, as fairly understood within the context of the statutory scheme, does the judicial oath requires that the prior decision be overruled?

Amicus answers: "YES"

Statement of Facts

Amicus takes no position as to the facts of this matter.

Summary of Argument

The legislative branch of government is the law-making branch, the judiciary having no authority to enact or amend a statute. Our state constitution explicitly prohibits one branch of government from exercising the powers of another.

A judicial construction of a statute that is in conflict with its text, as understood by a fair meaning of its terms, as employed within the statutory framework, is an exercise of legislative power in conflict with separation of powers. A later court has a duty, faced with a case involving construction of the statute, of self correction; this is commanded by the judicial oath. Precedent supplies a source of materials to a justice confronting a statute that has been construed previously, and if the prior construction is plausible a justice may, consistent with his or her oath, and as a matter of judicial humility, accept the prior construction. But the judicial oath commands the overruling of a statutory construction that is demonstrably erroneous as contrary to the text as reasonably understood by its terms, it context, history, and ordinary canons of construction.

Argument

I.

Our judicial oath requires justices swear or affirm they will support the constitution of this state. Legislative power is vested in the state House and Senate; further, no person exercising powers of one branch of state government may exercise power belonging to another branch. Faced with a judicial construction of a statute demonstrably contrary to its text, as fairly understood within the context of the statutory scheme, the judicial oath requires that the prior decision be overruled.

- *I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of justice of the Michigan Supreme Court according to the best of my ability.*[1]

- *The legislative power of the State of Michigan is vested in a senate and a house of representatives.*[2]

- *No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.*[3]

I. Introduction

A coherent theory of stare decisis cannot be developed without an appreciation of the sort of decisions a court is authorized to make in the first instance—what is the reach of the judicial

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[1] Const. 1963, Art. XI, § 1.

[2] Const. 1963, Art. IV.

[3] Const. 1963, Art. III, § 2.

power? Further, overruling decisions are not all of one piece—an accounting one does not find in the literature or the cases—in that the authority exercised by the judicial branch varies depending on the sort of case that is before the court (does the case deal with a common-law cause of action, a court rule or rule of evidence, a statutory cause of action or crime, a statutory jurisdictional or procedural provision or defense, or a constitutional provision, and if so, a provision concerning a substantive or procedural right?). Principles of stare decisis may well vary depending on the sort of authority exercised by the court. The subject is too vast to be discussed in all its components here; involved here is a question of stare decisis as applied to judicial construction of statutes, and amicus will thus concentrate on that question.

II. The Nature And Scope of the Judicial Power as Contrasted with the Legislative Power

A. The Judicial Role in Our Constitutional Democracy

The American political theory of popular sovereignty and a written and fixed constitution superior to ordinary legislation, rendering all members of the executive, legislative, and judicial branches representatives of popular sovereignty (the People possess both the constituent and the law-making authority, the latter delegated to their elected political representatives)[4] has clear implications for the role of the judiciary. At the time of the Revolution the judiciary was scarcely revered, but viewed with much the same suspicion as the magistracy or executive. But the American reconception of popular sovereignty, reacting against legislative supremacy and placing the authority and power of the people in a fixed constitution standing superior to the legislature, required a re-thinking also of the role of the judiciary. If the legislature was not, as the English parliament, to

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[4] See Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America*, p. 256-258; Bernard Bailyn, *The Ideological Origins of the American Revolution*, p. 182.

possess sovereignty, but instead to act as servant of the people within durable constraints established by them, a mechanism was necessary to insure that the legislature, which possessed the delegated law-making authority, did not enact laws against the constitution and thereby against the rights of the people. Otherwise, the servant of the people—the government—would be superior to the master—the people. Acts of the legislature had to be subject to the scrutiny of the people, and the judiciary, under the Constitution, was the servant of the people established in part for this purpose.[5] "The doctrine of judicial review...was inescapable once a written constitution was made supreme over legislation as an act of the sovereign people."[6] Included in the "judicial power," then, is the power of the judicial branch, as servant of the people, to keep the other branches of government within the limits of authority granted by the sovereign people in their constitution. But the judiciary is not a council of review established to measure legislation and the acts of the executive against the provisions of the Constitution; the role of judicial review occurs only incidentally as a part of the exercise of *judicial* power, triggered by review of concrete cases or controversies.[7] And while the judicial branch is to keep the other branches of government within the limits of their authority granted by the people, so also in exercising this authority the judicial branch must stay within the limits of its *own* authority given it by the people. What, then, is the judicial power that is granted to the judicial branch by the sovereign people in the Constitution, from which grant the judiciary itself is not free to depart?

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[5] Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, p. 456.

[6] Morgan, at 260.

[7] There is in this state special advisory opinion power granted the Michigan Supreme Court by Const 1963, Article 3, § 8 under certain circumstances, a discussion of which is not necessary here.

B. The Legislative Power

To understand the nature and scope of the judicial power it is helpful to contrast it with the legislative power. State government is organized on a fundamentally different principle than the federal government. In 1832 a vote on the "expediency of forming a state government" was held in the territory that comprises Michigan, and in 1833 a formal petition for statehood was made. The state government was formed under Michigan's first constitution in 1835, though Michigan was not admitted to statehood until 1837 because of certain boundary disputes. Regarding the power of government, in Article IV, the "Legislative Department," the first section declared that "The Legislative power shall be vested in a Senate and House of Representatives." There was no enumeration of the powers of Congress, as in Article I, § 8 of the United States Constitution.

The Constitution of 1850 also contained an article, Article 4, on the "Legislative Department," and again the first section stated that "The Legislative power is vested in a Senate and House of Representatives." There was no counterpart to Article I, § 8 of the United States Constitution. The "Legislative Department" was contained in Article V, § 1 of the Constitution of 1908, which stated that "The legislative power of the state of Michigan is vested in a senate and house of representatives," the section going on to specifically preserve the rights of initiative and referendum. There again was no counterpart to Article I, § 8 of the United States Constitution. Article IV of our current Constitution concerns the "Legislative Branch," and § 1, consistent with the prior constitutions, states that "The legislative power of the State of Michigan is vested in a senate and a house of representatives." Our current constitution also does not contain an enumeration of the extent of the legislative power similar to that in Article I, § 8 of the United States Constitution.

The legislature has all legislative authority save that which the constitution specifically prohibits (e.g., the power to legislate a death penalty, see Art. 4, § 46). In order for the federal Congress to have authority for a particular action it must ground that action in a *grant* of authority found in Article I, § 8;[8] in order for the Michigan Legislature to be prevented from action some provision in the constitution must be found that prohibits the action that the legislature has taken. As stated in *Attorney General v Preston*,[9] "[t]he Constitution is not a grant of power, but a limitation upon its exercise by the agents of the people who compose the legislative branch of the government. The Legislature would have the power [to enact the statute in question] had there been nothing contained in the Constitution upon the subject. And the question is now presented, in what respect and to what extent, has the Constitution limited this power of the Legislature?"

There is, then, a fundamental distinction between the power and authority of the United States Congress and the power and authority of the Michigan legislature under the respective constitutions: the Constitution of the United States is a delegation of power to Congress, while the constitution of a state is a limitation of power. Justice Cooley said long ago concerning state constitutions that "[i]n creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose...." On the other hand, Cooley observed, "[t]he government of the United States is one of *enumerated powers*; the national Constitution being the instrument that specifies

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[8] See e.g. *United States v Lopez*, 514 US 549, 552, 115 S Ct 1624, 131 L Ed 2d 626 (1995).

[9] *Attorney General v Preston*, 56 Mich 177, 179 (1885).

them, and in which authority should be found for the exercise of any power which the national government assumes to possess."[10] This principle that Congress only possesses those powers delegated, the remainder of power being reserved to the People and the States, "differs from the constitutions of the several States, which are not grants of power to the States, but which impose restrictions upon powers which the States inherently possess."[11]

The legislative power is thus very broad, for "every subject within the scope of civil government is liable to be dealt with by the legislature."[12] The legislature has the authority under the Michigan Constitution to "make laws, and to alter and repeal them," and included among the laws that the legislature may enact are those that constitute rules of civil conduct, and also those within the police power, which includes the system of internal regulation of the state,

> by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.[13]

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[10] Cooley, *Constitutional Limitations*, at p. 87; see also *Moore v Harrison*, 224 Mich 512, 195 NW 306(1923).

[11] Cooley, p. 9-10 (emphasis in the original).

[12] Cooley, p. 88.

[13] Cooley, p. 90, 572.

The making of a law is a "predetermination of what the law shall be for the regulation of all future cases falling under its provisions."[14] The judicial power is distinct from, and may not exercise the authority of, the legislative power.

C. The Judicial Power

The United States Constitution provides in Article III, § 1 that "The *Judicial Power* of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." Similarly, the Michigan Constitution of 1963 provides in Article 6, § 1 that "The *judicial power* of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house." From its first constitution Michigan has vested the judicial power in the supreme court and its inferior courts.[15] Each constitution has also provided that one department of government shall not exercise the powers of another.[16] The terminology of the Michigan Constitution and the United States Constitution are the same, and thus venerable precedent from the United States Supreme Court regarding the meaning of "judicial power" is persuasive in the absence of any principled indication

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[14] Cooley, p. 91.

[15] Const 1835, Article 7, § 1; Const 1850 Article 6, § 1; Const 1908, Article VII, § 1; Const 1963, Article 6, § 1.

[16] Const 1835, Article III, § 1; Const 1850, Article 3, § 2; Const 1908, Article IV, § 2; Const 1963, Article 3, § 2.

that the drafters and ratifiers of the Michigan Constitution meant something different.[17] Guidance can be found in the very case establishing judicial review of statutes with regard to their constitutionality —*Marbury* v *Madison.*[18] Chief Justice Marshall observed that the "whole judicial power of the United States" is vested in the Supreme Court and in those inferior courts that Congress sees fit to establish. If, held the Court, an act of the legislature is repugnant to the constitution it is void, and if it is void, it cannot bind the courts and oblige them to give it effect, for "[i]t is emphatically the province and duty of the judicial department to say what the law *is*."[19] The province of the judicial department, then, is to "say what the law *is*"; the "judicial power" does not encompass *lawmaking*. Put plainly, the *creation* of substantive law is not within the rightful authority of the judiciary. Michigan has always been very clear on the point that the powers of the departments of government are separate and that no department or branch shall exercise power granted to another. While separation of powers is a structural concept implicit in the federal constitution, it is *explicit* in the Michigan constitution.[20] An exercise of legislative authority by the judicial branch is thus beyond the scope of the judicial power, and at once a violation of the principle of separation of powers.

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[17] See *People* v *Pickens*, 446 Mich 298, 521 NW2d 727 (1994); see also *People* v *Nash*, 418 Mich 196, 341 NW2d 439 (1983); *People* v *Collins*, 438 Mich 8, 475 NW2d 684 (1991).

[18] *Marbury v Madison*, 1 Cranch 137, 2 L Ed 60 (1803).

[19] 2 L Ed at 73. See also *American Trucking Assns* v *Smith*, 496 US 167, 110 L Ed 2d 148, 110 S Ct 2323 (1990), separate concurring opinion of Justice Scalia, and dissenting opinion of Justice Stevens; and *James Beam Distilling Co* v *Georgia*, 501 US 529, 111 S Ct 2439, 115 L Ed 2d 481 (1991), separate concurring opinion of Justice Blackmun, joined by Justices Marshall and Scalia, and separate concurring opinion of Justice Scalia, joined by Justices Blackmun and Marshall.

[20] 1963 Mich Const, Art. 3, § 2.

Michigan precedent also exists on the point, extending to the early days of Michigan law. In 1859 one of the greats of Michigan jurisprudence, Justice Campbell (the "Big Four" of Michigan jurisprudence consisting of Justices Campbell, Christiancy, Cooley, and Graves), stated that "[b]y the judicial power of courts is generally understood the power to *hear and determine controversies between adverse parties, and questions in litigation.*"[21] The court has also said that "the exercise of judicial power in its legal sense can be conferred only upon courts named in the Constitution. The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them."[22] Some seven decades later the court reiterated that "[t]he power given to a court is judicial power....*'to declare what the law is and to determine the rights of parties conformably thereto*'....'to hear and decide controversies, and to make binding orders and judgments respecting them.'"[23]

Justice Cooley made the same point. Quoting Chief Justice Marshall from *Wayman* v *Southard*,[24] Justice Cooley observed that "'[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.'" Further, "to adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to

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[21] *Daniels* v *People*, 2 Mich 380, 388 (1859) (emphasis added), citing *Story on the Constitution*, sec. 1640. Justice Campbell said much the same thing several years later in *Underwood* v *McDuffee*, 15 Mich 361 (1867).

[22] *Risser* v *Hoyt*, 53 Mich 185,193, 18 NW 611 (1884)

[23] *Johnson* v *Kramer Freight Lines*, 357 Mich 254, 258, 98 NW2d 586 (1959) (emphasis supplied).

[24] *Wayman* v *Southard*, 10 Wheat 46 (1824).

construe and apply the laws, is the peculiar province of the judicial department." Distinguishing the construction of positive law from its creation, Justice Cooley wrote that

> ...those inquiries, deliberations, orders, and decrees, which are peculiar to such a department (the judicial department), must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employment of judicial and legislative tribunals. The former *decide upon the legality of claims and conduct*, and the latter *make rules* upon which, in connection with the constitution, *those decisions should be found.* It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore,—to compare the claims of parties with the law of the land before established,—is in its nature a judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in itself a legislative act.... [25]

D. Summary

Only the people possess the constituent power—the sovereign power—and thus only the people may alter or amend the Constitution. Only the legislature possesses the law-making power, and only the judiciary possesses the authority to construe and apply the law in deciding cases and controversies, and in so doing it may not exercise either the sovereign power of the people nor the law-making power of the people's legislative representatives. In deciding cases and controversies, one source of law the judiciary must "construe and apply" is that the people's political representatives have made; that is, statutory law.

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[25] Cooley, p. 91-92 (emphasis added, final two instances of emphasis in the original). This court's constitutional authority over practice and procedure, which is independent from cases and controversies, is not pertinent to the discussion here.

III. Stare Decisis And Statutory Construction: An Oath-Based View

A. The Task of Construction and the "Intent" of the Legislature

That statutory construction may give rise to overruling decisions is neither controversial nor remarkable. Unlike the common law, the lawgiver is external to the judiciary; there is a written text to construe, and, in the context of overruling decisions, a written text to compare with any prior judicial decision. And so in determining "what the law is" so as to apply it to a particular case or controversy, a court may either construe a statute for the first time, and in that sense (and that sense only) "make law," or conclude that a previous construction of the statute was mistaken, bringing into play principles of stare decisis. But though it is unremarkable that courts must construe statutes, and on occasion may conclude that a previous construction was mistaken, there *is* some controversy regarding just what it is a court is to do when construing a statute.

Michigan's statement of the task of the judiciary in statutory construction is orthodox:

- "Our primary aim is to effect the intent of the Legislature."
- "We first examine the language of the statute and if it is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written." In this examination, common words must be understood to have their everyday, plain meaning, and technical words, including terms of "legal art," are to be given their understood technical meaning.[26]

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[26] Helpfully, Michigan has statutes on the point: MCL 8.3a provides that "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."; see also MCL 750.2 regarding construction of penal statute: "The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

- "*Only* where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent" and look to such aids as legislative history.[27]

This orthodox view, which has come to be known, sometimes derisively, as "textualism," has come under some attack, though in some of the expressed disagreement there appears to be more than a whiff of the semantic. An in-depth discussion of statutory construction is beyond the scope here, but some discussion of the broad contours of the task of a court in construing a statute is necessary to a discussion on overruling decisions involving statutory construction, and the role of stare decisis in the process.

The principal disagreement between textualists and their critics is a fundamental one: when a court undertakes to "effect the intent of the legislature" what is it the court is attempting to discover? Judge Easterbrook has written that "intent is empty."[28] By this he means not that the legislature is not the lawgiver, with the role of the court to discover what law it is the legislature has enacted, but that there is no collective *subjective* legislative intent: "Peer inside the heads of legislators and you find a hodgepodge....Intent is elusive for a natural person, fictive for a collective body."[29] When a court looks to determine "what the law is" when the law is a statute, it is more precise to say the court should attempt to ascertain the "expressed" intent of the legislature, which

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[27] See e.g. *Wickens v. Oakwood Healthcare Sys.*, 465 Mich. 53, 60, 631 N.W.2d 686 (2001); *People v. Phillips,* 469 Mich. 390, 666 N.W.2d 657 (2003); *Gilbert v. Second Injury Fund,* 463 Mich. 866, 616 N.W.2d 161 (2000); *People v. Davis,* 468 Mich. 77, 658 N.W.2d 800 (2003); *Dan De Farms, Inc. v. Sterling Farm Supply, Inc.*, 465 Mich. 872, 633 N.W.2d 824 (2001). This court has criticized the use of legislative history in the construction of statutes that are not ambiguous. See e.g. *People v. Guerra*, 469 Mich 966 (2003).

[28] Frank Easterbrook, "Text History, and Structure in Statutory Interpretation," 17 Harv Jrnl L & Pub Policy 62, 68 (1994).

[29] Id.

naturally leads one first to the principal expression of intent—the text of the statute. The "law" is what the "objective indication of the words" of the statute, in their context, including that of the statutory scheme, mean.[30] And when necessary to the task—but only then—aids to construction may be employed, such as established canons of construction, and even legislative history, where it exists, and where it is helpful (and it often is not).

Textualism, then, is not "strict constructionism," "a degraded form of textualism that brings the whole philosophy into disrepute."[31] And Judge Easterbrook, a textualist, has remarked that "'[p]lain meaning' as a way to understand language is silly. In interesting cases, meaning is not 'plain'" it must be imputed...."[32] But note the limitation of "interesting cases," which is to say that the meaning of a text, though often readily ascertainable from the meaning of the words understood in their ordinary sense, on occasion is ambiguous or, given the statutory scheme in which the text is placed, unclear. So long as the court in its attempt to discover the "objectified" intent of the legislature does so by seeking to determine "what a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*,"[33] its opportunity for supplanting the law as enacted with law of its own choosing is limited.

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[30] Antonin Scalia, *A Matter of Interpretation*, at 29.

[31] Id, at 23.

[32] Easterbrook, at 67.

[33] Scalia, at 17. And see Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum L Rev 427, 538 (1947)(quoting Justice Holmes as saying, with regard to legislative intent, "I don't care what their intention was. I only want to know what the words mean").

Returning, then, to the principles of statutory construction as oft-stated by this court, they may be rephrased as follows:

- Our primary aim is to effect the intent of the Legislature as that intent was objectified by the legislature in a written text.

- We first examine the language of the statute and if a reasonable person would gather a particular meaning from the words of the statute as used in the ordinary sense, placing the statute in context with the rest of the statutory scheme, we enforce that understanding; if the statute employs technical words and phrases, or words that may have acquired a peculiar and appropriate meaning in the law, those shall be construed and understood according to that meaning.

- Where a reasonable person could gather multiple meanings from the words of the statute as used in the ordinary sense, placing the statute in context with the rest of the statutory scheme, then other objective indicators of understanding are employed to the extent they are helpful, such as legislative history.

Because the People are sovereign in our constitutional democracy, and because the constitutional system put in place by the People delegates the law-making authority to the legislative branch with law to be enacted in a prescribed manner, including the assent of the chief executive officer unless his or her veto is overridden, the task of the judiciary in a case or controversy involving application of a statute is to enforce the law that the legislature enacted, discovering that law by reviewing the statutory text and objective indicators of its meaning where its meaning is doubtful. On occasion, this will result in a court running up against a previous explanation of the meaning of a statute that the court now believes is mistaken. The question of stare decisis then arises—what then is the court to do—enforce the statute the court is now convinced the legislature actually enacted, or the one the previous court, even if in all good faith, amended through its opinion, thereby, even if inadvertently, exercising the authority of a separate branch of government in violation of Article 3, § 2?

B. The Justifications for Stare Decisis

Before examining stare decisis in the context of statutory construction, some background on the commonly espoused justifications for the doctrine is necessary.

(1) The Deontological Justification for Stare Decisis

Stare decisis is, in a number of ways, an odd doctrine, at least when considered in the context of horizontal overruling.[34] Judges of courts of last resort, where the question of reconsidering prior precedent arises, take an oath—as do all legislative, executive, and judicial officers—to support the Constitution.[35] Their decisions, then, are to be faithful to statutes and constitutional provisions involved in the case before them. And yet stare decisis, the principal office of which is to shelter error from correction,[36] counsels a violation of that oath in particular cases. What justification can there be for this rather extraordinary doctrine?

The standard justifications for refusing to correct error have been helpfully categorized by a perceptive commentator as deontological justifications and consequentialist justifications.[37] Since

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[34] The principle that an inferior court is bound by the rulings of a superior court is actually one of power and authority in a hierarchical system, not stare decisis.

[35] Const. Art. VI cl. 3: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution...."; 1963 Mich Const. Art. 11, § 1: "All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability."

[36] See e.g. Cooper, "Stare Decisis: Precedent and Principle in Constitutional Adjudication," 73 Cornell L Rev 401, 404 (1988).

[37] Peters, "Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis," 105 Yale L J 2031, 2037 (1996).

no judge should knowingly do an injustice, both categories defend stare decisis on the ground that the sheltering of error can in fact *achieve* justice. The consequentialist justification posits that the injustice that might be entailed in an individual case is trumped by the justice-serving interests protected by stare decisis, focusing on predictability of the law so as to allow the ordering of conduct, stability of the law, and avoidance of frustration of expectations, as well as efficiency in the use of public resources. The end or consequence—the promotion of these more general or "long term" justice-serving interests—justifies the means—the sacrifice of justice in the individual case.[38] The deontological justification, on the other hand, is unconcerned with any arguable justice-serving consequences of adherence to an erroneous precedent; rather, that adherence is an end in itself.[39] That adjudicative consistency is an end itself is often expressed by the statement that, as a matter of justice, "like cases should be treated alike."[40]

The deontological justification for stare decisis—the sheltering of error on the basis of a norm of equality—has been demolished by Professors Westen[41] and Peters. Equality as a justification for adjudicative consistency is empty because it is tautological. To say "things that should be treated alike should be treated alike" is to say, as Professor Peters points out, that the individuals involved in the separate cases must be identically situated in the *appropriate* way,

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[38] See Peters, 2039-2043.

[39] Id.

[40] See e.g. *People v Jones*, 797 NE2d 640 657 (Ill, 20030: "The doctrine of *stare decisis* 'proceeds from the first principle of justice, that, absent powerful countervailing considerations, like cases ought to be decided alike.' "

[41] Peter Westen, "The Empty Idea of Equality," 95 Har L Rev 537 (1982); Peter Westen, *Speaking of Equality* (1990); Peters, supra.

measured by the appropriate standard, so that what is meant is that "people identically entitled to the relevant treatment are entitled to be treated identically,"[42] and this is tautological. For example, if a prosecuting attorney considering two cases with prospective defendants who have engaged in virtually identical conduct and with sufficient proof to charge each chooses to charge one and not the other, the one charged has no claim to relief *unless* the decision to charge was based on an irrelevant and invidious criterion, such as race or ethnicity.[43] That the two individuals are treated differently is not that which affords relief, but that the treatment of the one is unjust because that individual was burdened solely because of his or her race—an irrelevant characteristic—and that is *itself* unjust. The inequality that exists is only "a necessary reflection of the existence of a substantive injustice."[44]

Equality of treatment is only normative if it is posited as a substantive rule that the simple fact that a person has been treated in a particular manner in a given context requires that a person identically situated be treated in the same manner. Rather than requiring that all persons be treated justly, this principle requires that all persons be treated equally, even if that treatment is unjust. Equality of treatment trumps justice in treatment as a normative matter. This principle supplies a justification for stare decisis; one person having been treated unjustly by a misinterpretation of law, the "equality principle of justice" requires that the second person (and indeed all those who follow) also be treated unjustly. So long as *all* results are unjust, justice is achieved. A principle that

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[42] Peters, at 2059.

[43] See e.g. *United States v. Armstrong,* 517 US 456, 116 S Ct 1480, 134 L.Ed.2d 687 (1996).

[44] Peters, at 2062.

requires that one mistake having been made it be repeated ad infinitum—that requires that one person having been treated according to criteria irrelevant to the circumstances or according to an appropriate criteria misapplied in some manner, all persons must be treated in the same manner—contradicts nonegalitarian principles of justice, and renders the sequence of events (itself an irrelevant criteria) paramount.[45] And its supplies no rationale for *ever* overruling an existing precedent.

(2) The Consequentialist Justification for Stare Decisis

The consequentialist justification posits that the injustice that might be entailed in an individual case is trumped by the justice-serving interests protected by stare decisis, rather than finding stare decisis justified solely on the basis of adjudicative consistency as an intrinsic good. This is essentially a utilitarian defense of stare decisis, the notion being that stability in the law is more important than the "right answer" in that stability in the law has intrinsic value, allows the ordering of private conduct, and allows judicial resources to be husbanded.[46] The statement of Justice Brandeis that "[*st*]*are decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right" is oft-cited as a shield for erroneous statutory decisions, as Justice Brandeis was referring (and in dissent) to statutory decisions, and he limited his statement to situations where "correction can be had by legislation."[47] But even Justice Brandeis said only that statutory decisions "usually" should not be overruled, not

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[45] See Peters, 2066-2072.

[46] See e.g. Peters, at 2040.

[47] *Burnett v Coronado Oil and Gas Co.,* 285 US 393, 52 S Ct 443, 76 L Ed 815 (1932) (Brandeis, J. dissenting)(emphasis supplied).

that they should never be, and the Supreme Court has itself made clear that statutory decisions do not represent a "super class" of precedent, invulnerable to overruling. To the contrary, the Court has said that "we have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes."[48] Stare decisis is a "principle of policy,"[49] and not as an "inexorable command."[50] To be sure, "[t]he burden borne by the party advocating abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction,"[51] but that burden can be met. The difficulty lies in identifying at least the general contours of the manner in which that burden may be shouldered. The outline has been suggested by the Court, which has said that "[w]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' "[52] And a test stated by Justice Harlan that has been viewed as the "most stringent" among possibilities—that it "appear beyond doubt" that the decision being reconsidered "misapprehended the meaning of the controlling provision"—is also suggestive.[53] A decision that is, then, clearly wrong, its error demonstrated convincingly, is not to be sheltered from correction even on consequentialist grounds.

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[48] *Monell v. New York City Dept. of Social Servs.*, 436 US 658, 695, 98 S Ct2018, 2038, 56 L.Ed.2d 611 (1978); *Holder v. Hall,* 512 US 874, 944-945, 114 S Ct 2581, 2618 (1994).

[49] *Helvering v. Hallock,* 309 US 106, 119, 60 S Ct 444, 451, 84 L Ed 604 (1940).

[50] *Payne v Tennessee,* 501 US 808, 828, 111 S Ct 2597, 2609, 115 L Ed 720 (1991).

[51] *Patterson v. McLean Credit Union,* 491 U.S. 164, 172-173, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989).

[52] *Seminole Tribe of Florida v. Florida,* 517 US 44, 63, 116 S Ct 1114, 1127 (1996).

[53] *Monroe v. Pape*, 365 US 167, 192, 81 S Ct 473, 487, 5 L Ed 2d 492 (1961)(Harlan, J. concurring). See also *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 US 616, 673, 107 S Ct 1442, 1473, 94 L Ed 2d 615 (1987) (Scalia, J., dissenting).

(3) The "Legislative Acquiescence" Justification for Stare Decisis

It has sometimes been said that a judicial construction of a statutory text obviously at odds with that text as fairly construed within the statutory scheme should be followed nonetheless if time has passed and the legislature has not acted to amend the statute in some way so as to repudiate the judicial construction. This notion that the "failure" of the legislature to amend a statute so as to overturn specifically some judicial pronouncement is an acceptance by the legislature of that pronouncement—akin to the actual enactment of the judicial gloss into statutory law as though it had passed both Houses of the legislature and been signed by the governor—is a profound misunderstanding of our system of government. As Justice Scalia has said, "[t]his assumption, which frequently haunts our opinions, should be put to rest," for it is, in fact, "a canard"[54] in that it ignores "rudimentary principles of political science to draw any conclusions regarding 'the intent of the legislature' from the *failure* to enact legislation."[55] Indeed, "[w]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."[56]

The doctrine of legislative acquiescence has also long been suspect in this state. This court attacked it in several opinions as much as four decades ago. In *Halfacre v Paragon Bridge and Steel*

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[54] See *Johnson v Transportation Agency*, 480 US 616,673, 94 L Ed 2d 615, 656, 107 S Ct 1442 (1987) (Justice Scalia dissenting). See also *Patterson v McLean Credit Union*, 491 US 164, 105 L Ed 2d 132, 109 S Ct 2363 (1989): "It does not follow...that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation....Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President.... Congressional inaction cannot amend a duly enacted statute." See further *Central Bank v First International Bank*, 511 US 264, 128 L Ed 2d 119, 114 S Ct 1439 (1994).

[55] 480 US at 673, 94 L Ed 2d at 656.

[56] *Helvering v Hallock*, 309 US 106, 121 84 L Ed 604, 60 S Ct 444 (1944).

Co[57] the court called it "this weird doctrine of legislative action by inaction," and said that the court had a "right and duty to re-examine and re-examine again, if need be, statutory enactments already judicially construed," unrestricted by "such stultifying notions of judicial infallibility or, if you wish, impotence, that once having spoken we can speak no more."[58] The court called the doctrine a "pernicious evil designed to relieve a court of its duty of self-correction," which had been "examined and rejected by this court before."[59]

And more recent decisions of this court have firmly laid the doctrine to rest. In *Donajkowski v Alpena Power*[60] this court remarked that "legislative acquiescence is an exceedingly poor indicator of legislative intent." The court made the matter clear:

> If it has not been clear in our previous decisions, we wish to make it clear now: "legislative acquiescence" is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words,* not from its silence.[61]

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[57] *Halfacre v Paragon Bridge and Steel Co.*, 368 Mich 366 (1962).

[58] 368 Mich at 377-379.

[59] And see *Wycko v Gnodtke*, 361 Mich 331, 338 (1960)("a legislature legislates by legislating, not by doing nothing, not by keeping silent"). As Justice Scalia observed in his dissent in *Johnson*: "[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The 'complicated check on legislation,' The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." 480 US at 672.

[60] *Donajkowski v Alpena Power*, 460 Mich 243 (1999).

[61] 460 Mich at 261.

Since *Donajkowski* this court has repeatedly disparaged the doctrine of legislative acquiescence as unsound.[62] It is of no weight in consideration of whether a prior construction of a statute should be followed.

(4) The "Legislative Reenactment"Justification for Stare Decisis

A sort of corollary to the legislative-acquiescence doctrine—as it also infers action from silence—is the "ratification by reenactment" principle. The notion is that if the legislature while amending a portion of a statutory scheme "reenacts" a provision that has been judicially construed, the legislature should be taken as having ratified the judicial construction of the untouched portions of the statutory scheme. Properly limited,[63] this doctrine has its uses, but can be—and often is—dramatically misemployed. There are circumstances where it is apparent from the work of the legislature on provisions surrounding that which has been judicially construed that the legislature is ratifying the judicial construction. For example, in MCL 769.9 the legislature mandated indeterminate sentencing when a term of years is imposed: "If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate

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[62] See e.g *People v Borchard-Ruhland*, 460 Mich 278, 285 (1999); *Robinson v City of Detroit*, 462 Mich 439, 461 (2000); *Hanson v Board of County Road Commissioners*, 465 Mich 492, 502 (2002); *Robinson v DaimlerChrysler Corp*, 465 Mich 732, 760 (2002); *People v Hawkins*, 468 Mich 488, 507-510 (2003); *Neal v Wilkes*, 470 Mich 661, 668 (2004); *Devillers v Auto Club Ins. Ass'n*, 473 Mich 562, 592 (2005).

[63] This court has spoken to the impropriety of blanket acceptance and application of such a doctrine: "Taken to its logical conclusion, application of the reenactment doctrine...would undoubtedly lead to results never anticipated or intended by the Legislature. For example, suppose that the Legislature amends a statutory code to make all pronouns gender-neutral, but otherwise reenacts the code as originally written. It would be neither accurate nor reasonable to presume...that the Legislature intended to adopt *in toto* every appellate decision construing or applying the code." *People v. Hawkins, supra,* 468 Mich at 509.

sentences." The legislature imposed no requirement limiting the minimum sentence so imposed to any particular fraction of the maximum. But in *People v Tanner*[64] this court found that sentences with minimums very close to the maximum did not, in its view, comport "with the clear intent and purpose of the indeterminate sentence act." The court then read into the statute a provision not enacted by the legislature—that the minimum of an indeterminate sentence could be no more than 2/3 of the maximum sentence.[65] A fair argument could be made that the legislature not having chosen to impose a limitation on the minimum a sentencing judge could impose in an indeterminate sentence in terms of its relation to the maximum, the court had exercised legislative power in so providing, in violation of our prohibition on the exercise of the powers of one branch of government by another. But when enacting the sentencing-guidelines scheme twenty-five years later the legislature provided in MCL 769.34(2)(b) that "[t]he [sentencing] court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence." There would be no point, then, to revisiting *Tanner*'s construction of MCL 769.9 given the ratification (by enactment) of that construction later in another provision of the statutory scheme.[66]

As this court has put it,

> Our point is not that the reenactment doctrine, properly limited and applied, is without value as a statutory construction aid, but that it cannot be employed indiscriminately and without recognition of the fact that its more expansive versions impose an unreasonable burden on the Legislature to affirmatively scan our appellate casebooks to discern judicial constructions of statutes that the Legislature desires for entirely other reasons to amend. Applying the reenactment rule

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[64] *People v Tanner*, 387 Mich 683 (1972).

[65] 387 Mich at 690.

[66] And of course indications of ratification can be more subtle.

> here would, in our view, be the effective equivalent of imposing an *affirmative duty* on the Legislature to keep abreast of all binding judicial pronouncements involving the construction of statutes and to revise those statutes to repudiate any judicial construction with which it disagrees. For similar reasons, we have rejected precisely such a duty in other contexts.[67]

But of whatever utility the reenactment doctrine is in cases involving the construction of a statute with at least some ambiguity, it provides no shelter for a decision that is demonstrably in conflict with the text of the statute. The reenactment doctrine has been more often used with regard to administrative law and constructions of statutes by the applicable governmental agencies. And here it has been made quite clear that "[n]o deference is due to agency interpretations at odds with the plain language of the statute itself. *Even contemporaneous and longstanding* agency interpretations must fall to the extent they conflict with statutory language."[68] Why is this so? Because "amendments" or "revisions" to statutes by executive agencies run afoul of principles of separation of powers; only the legislature can enact a statute. This is no less true when the decision of a court "is at odds with the plain language of the statute itself." Here also even "longstanding" precedents "must fall to the extent they conflict with statutory language." Where a statutory text is plain on its face, "subsequent reenactment does not constitute an adoption" of a previous construction by another branch of government, for when a court confronts a statute the terms of

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[67] *People v. Hawkins*, supra, 468 Mich at 509. See also *Nawrocki v Macomb County Road Commission*, supra.

[68] *Public Employees Retirement Sys. v. Betts,* 492 US 158, 171, 109 S Ct 2854, 2863, 106 L Ed 2d 134 (1989)(emphasis supplied).

which are "unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."[69] And thus this court has said forcefully that neither

> "legislative acquiescence" nor the "reenactment doctrine" may "be utilized to subordinate the plain language of a statute."...[I]n the absence of a clear indication that the Legislature intended to either adopt or repudiate this Court's prior construction, there is no reason to subordinate our primary principle of construction—to ascertain the Legislature's intent by first examining the statute's language—to the reenactment rule."[70]

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[69] *Demarest v Manspeaker*, 498 US 184, 190, 112 L Ed 2d 608, 111 S Ct 599, 603-604 (1991). Also cautioning against drawing inferences from silence—even silence occurring during a reenactment—see *Patterson v. McLean Credit Union,* 491 U.S. 164, 175, 109 S.Ct. 2363, 2371 105 L.Ed.2d 132 (1989): "Justice Brennan objects also to the fact that our *stare decisis* analysis places no reliance on the fact that Congress itself has not overturned the interpretation of § 1981 contained in *Runyon,* and in effect has ratified our decision in that case. ... This is no oversight on our part....It does not follow... that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is "impossible to assert with any degree of assurance that congressional failure to act represents" affirmative congressional approval of the Court's statutory interpretation. ...Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U.S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute."

[70] *Devillers v. Auto Club Ins. Ass'n*, supra, 473 Mich at 592, quoting from *People v Hawkins*, supra.

C. An Oath-Based Principle of Stare Decisis

(1) The Oath, The Judicial Role, and Separation of Powers

When involved is construction of a written statutory text, that which the court seeks is not private justice, but public justice; that is, to identify accurately the "objectified intent" of the legislative branch. When the court has previously construed the statute, but misidentified that which the legislature enacted, it has created a new statute, one other than that enacted by the constitutionally designated process, and has exercised power in derogation of our separation of powers provision. To effectuate public justice, and to be faithful to the judicial oath, it *is* important that it is the legislative and not the judicial will that is enforced. As one scholar has put it, "[w]hat is important in adjudication is reaching the right result—the just result, all things considered....our courts finally must rid themselves of the habit of thinking that adjudicative consistency holds some inherent value tugging them away from what is just."[71] The entire notion of enforcement of judicial constructions of statutes (as well as constitutional provisions) necessarily presupposes that there are "right answers" to questions of construction of these texts. Judge Easterbrook well states the point:"judicial review came from a theory of meaning that supposed the possibility of right answers....,"[72] for if there are instead multiple "right" or permissible answers, no choice by any branch of government—including the judiciary—from within the field of permissible right answers can bind

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[71] Christopher Peters, "'Foolish Consistency': On Equality, Integrity, and Justice in *Stare Decisis*," 105 Yale L J 2031, 2113 (1996).

[72] Easterbrook, "Alternatives to Originalism?", 19 Harv J L & Pub Pol'y 479, 486 (1995).

anyone else, and without a theory under which everyone must follow one answer, the theory of judicial review expounded by Chief Justice Marshall collapses.[73]

Adherence to the law and not past precedent is required by the judicial oath. Justice Douglas's remarks concerning constitutional construction apply equally to statutory precedent; he wrote that "[a] judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."[74] And Justice Scalia has made the same point: "I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."[75]

An oath-based view of a judge or justice's duty to overrule mistaken constructions of a statutory or constitutional text, which has been referred to as an attempt to take the "moral high ground of the judicial oath to uphold the Constitution,"[76] may be subject to attack as fostering chaos,

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[73] See also Symposium, "Discussion: The Role of the Legislative and Executive Branches in Interpreting the Constitution," 73 Cornell L Rev 386, 399 (1988).

[74] Douglas, Stare Decisis, 49 Colum L Rev 735, 736 (1949).

[75] *South Carolina v. Gathers,* 490 US 805, 825, 109 S Ct 2207, 2218, 104 L Ed 2d 876 (1989) (Scalia, J., dissenting), overruled by *Payne v Tennessee*, 501 US 808, 111 S Ct 2597, 115 L Ed 2d 720 (1991).

[76] Thomas R. Lee, "Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court," 52 Vand. L. Rev. 647, 704 (1999). And see Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 319 n.349 (1994) ("The Constitution and federal statutes are written law (not common law); judges are bound by their oaths to interpret that law as they understand it, not as it has been understood by others.").

for it may be argued that "[t]he logical end of the judicial oath argument...is not a reduced standard of deference ..., but a wholesale abandonment of stare decisis."[77] But is this so? Cannot a justice remain faithful to his or her oath when confronting a construction of a statutory (or constitutional) text that the justice is convinced is erroneous, and yet still find a place for stare decisis? The answer, it is submitted, is yes, and is to be found in judicial humility.

(2) The Principle of Judicial Humility

As cases previously cited demonstrate, courts occasionally rely solely on stare decisis when confronting a previous construction of a statutory (or constitutional) text so as to affirm that construction, but also occasionally overrule statutory (and constitutional) decisions. And the matter is one which lies solely with the judiciary; neither the following of stare decisis nor its disregard can be compelled. How, then, should a principled jurist act when confronting a previous judicial interpretation of a statutory text? That jurist must, above all, remain faithful to the oath, but should approach the task of construction with an *attitude of humility*.

This attitude has been cogently stated by a celebrated jurist: "One entrusted with decision...must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must disconnect his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience...."[78] Precedent furnishes material for the judge or justice in the process of construction of the text, and in obeying his or her oath of office an appropriate respect to the work of those who have gone before should be expected. If a justice

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[77] Lee, at 711.

[78] R. Traynor, "Reasoning in a Circle of Law," 56 Val L Rev 739, 750-751 (1970).

confronts a precedent that construes a statutory text plausibly—if a reasonable person could gather that meaning from the words of the statute as used in the ordinary sense (or, if technical words or words with an accepted legal meaning are used, viewing those words in that sense), placing the statute in context with the rest of the statutory scheme—then a justice who would reach a different conclusion if viewing the matter in the first instance may defer to his or her predecessors as a matter of humility without violation of the judicial oath. But respectful consideration is not slavish obeisance. To uphold demonstrably erroneous constructions of texts promulgated by a separate and coequal branch of government, and the one invested with the lawmaking power, *does* implicate the judicial oath. If the prior construction is in fact *implausible* because flatly contrary to a textual provision, or an unreasonable construction in light of the text, ordinary canons of construction,[79] history, and/or the structure of the statutory scheme, or the prior decision employed inappropriate considerations, such as policy considerations belonging to the legislature, to reach its conclusions, then the court, to be faithful to its oath, must act. And there *are* demonstrably erroneous constructions of statutory texts.[80]

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[79] For example, there is no question that "[w]hen construing a statute, the court must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory.....If possible, effect should be given to each provision. *Gebhardt v. O'Rourke,* 444 Mich. 535, 542, 510 N.W.2d 900 (1994)." *People v. Borchard-Ruhland,* 460 Mich. 278, *285, 597 N.W.2d 1, 6 (1999). A previous construction of a statute writing a provision right out of the statute is immediately suspect.

[80] See Caleb Nelson, "Stare Decisis and Demonstrably Erroneous Precedents," 87 Virginia Law Rev 1 (2001). As a recent example see *People v. Schaefer,* 473 Mich. 418 (2005), where six members of the court agreed that the decision in *People v Lardie*, 452 Mich. 231 (1996) was contrary—demonstrably erroneous—to the statutory text in reading the modifier "intoxicated," which in the text modifies the driver of the vehicle, as modifying the manner of driving ("The plain text of § 625(4) does not require that the prosecution prove the defendant's intoxicated state affected his or her operation of the motor vehicle").

IV. Conclusion

This court has observed that "laws [are] generally made more 'evenhanded, predictable and consistent' when their words mean what they plainly say; moreover, "laws are also made more accessible to the people when each of them is able to read the law and thereby understand his or her rights and responsibilities. When the words of the law bear little or no relationship to what courts say the law means..., then the law increasingly becomes the exclusive province of lawyers and judges."[81] Even more importantly, principles of separation of powers, to which the judicial oath commands obedience, compel a court to engage in *self* correction when it is demonstrable that in its previous decision it engaged in judicial legislation.

Amicus, obviously, as to the merits of the current case has "no dog in this fight," being concerned here only with the issue of principles of stare decisis as applied to the construction of statutes. If the prior construction is contrary to the text as the words would ordinarily be understood, if that construction cannot somehow be justified by a contextual argument, if it runs afoul of standard canons of construction, such as by rendering a portion of the text nugatory or surplusage, if the prior construction relied not on text but on assertions of social policy that are appropriate not to the court, but the legislature—if the prior reading is thus demonstrably erroneous—then the commands of the

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[81] *Garg v. Macomb County Community Mental Health Services,* 472 Mich 263, 285 (2005).

judicial oath require that the statute be construed as the legislature wrote it, and the prior decision overruled.[82]

[82] It may be that the consideration of the judicial oath, while requiring that a demonstrably erroneous decision be overruled when considered on the merits, do not compel a court the jurisdiction of which is discretionary with the court to grant consideration of the case in the first place; on the other hand, there is a strong argument that the oath compels correction in this circumstance as well. Because this case is before the court on leave granted, this point will not be explored here.

Relief

WHEREFORE, amicus requests that this court do as justify may require with regard to the merits of this case..

Respectfully submitted,

KYM L. WORTHY
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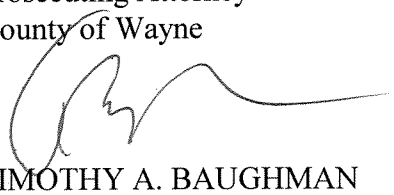

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